

Bank of N.Y. Mellon v Spero
2014 NY Slip Op 30822(U)
March 31, 2014
Supreme Court, Suffolk County
Docket Number: 11-39305
Judge: Jr., Andrew G. Tarantino
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

P R E S E N T :

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 3-5-13
ADJ. DATE 2/4/2014
Mot. Seq. # 001 - MotD
 # 002 - XMotD

-----X
THE BANK OF NEW YORK MELLON FKA
THE BANK OF NEW YORK, AS TRUSTEE
FOR THE CERTIFICATEHOLDERS OF THE
CWMBS INC., CHL MORTGAGE PASS-
THROUGH TRUST 2002-26, MORTGAGE
PASS THROUGH CERTIFICATES, SERIES
2002-26

Plaintiff,

- against -

JAMES SPERO, MAUREEN KEEFE-SPERO,
CHASE BANK USA, N.A.
AMERICAN EXPRESS BANK, FSB
FAIRFIELD AT RIVERHEAD LLC.
JPMORGAN CHASE BANK, N.A.
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE
JOSE ANTONIO PADILLA
NEW YORK STATE ON BEHALF OF
UNIVERSITY HOSPITAL I P
UNITED STATES OF AMERICA
"JOHN DOE #1" to "JOHN DOE #10," the last 10
names being fictitious and unknown to plaintiff,
the persons or parties intended being the persons
or parties, if any, having or claiming an interest in
or lien upon the mortgaged premises described in
the verified complaint,

Defendant,.

-----X

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Upon the following papers numbered 1 to 29, read on this motion for summary judgment and an order of reference; Notice of Motion/Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers 18 - 27; Answering Affidavits and supporting papers 28 - 29; ~~Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,~~

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (001) by plaintiff The Bank of New York Mellon fka the Bank of New York, as Trustee for the Certificateholders of the CWMBS Inc., CHL Mortgage Pass-Through Trust 2002-26, Mortgage Pass Through Certificates, Series 2002-26 (Bank of New York), pursuant to CPLR 3212 for summary judgment on its complaint, to strike the answer and defenses of defendants James Spero and Maureen Keefe-Spero (collectively Spero), for a default judgment as against defendants Chase Bank USA, N.A., American Express Bank, FSB, New York State Department of Taxation and Finance, Jose Antonio Padilla, and New York State on Behalf of University Hospital I P and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting John Spero in place of defendant "John Doe #1" and by striking therefrom the remaining defendants sued herein as "John Doe #2" through "John Doe #10"; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

THE BANK OF NEW YORK MELLON FKA THE
BANK OF NEW YORK, AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF THE CWMBS INC.,
CHL MORTGAGE PASS-THROUGH TRUST 2002-26,
MORTGAGE PASS THROUGH CERTIFICATES,
SERIES 2002-26

Plaintiff,

- against -

JAMES SPERO, MAUREEN KEEFE-SPERO, CHASE
BANK USA, N.A., AMERICAN EXPRESS BANK, FSB,
FAIRFIELD AT RIVERHEAD LLC., JPMORGAN CHASE
BANK, N.A., NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, JOSE ANTONIO PADILLA
NEW YORK STATE ON BEHALF OF UNIVERSITY
HOSPITAL I P, UNITED STATES OF AMERICA,
JOHN SPERO,

Defendants.

ORDERED that the branches of this cross motion (002) by defendants Spero for an order pursuant to CPLR 3211 (a) (1), (2), (3) and (7) dismissing plaintiff's complaint and cancelling the notice of pendency is denied; and it is further

ORDERED that the remaining relief requested by defendants Spero seeking an order denying plaintiff's motion for summary judgment and for an order of reference, is granted.

This is an action to foreclose a mortgage on premises known as 4 Seaview Lane, Mount Sinai, New York. On September 3, 2002, defendants Spero executed a note in favor of America's Wholesale Lender agreeing to pay \$315,000.00 at the yearly rate of 6.000 percent. On September 3, 2002, defendants Spero also executed a mortgage in the principal sum of \$315,000.00 on their home. The mortgage was recorded on October 31, 2002 with the Suffolk County Clerk's Office. Thereafter, on November 29, 2011, the mortgage was transferred by assignment of mortgage from America's Wholesale Lender to plaintiff Bank of New York. The subject note contains the undated blank indorsement of E. Espinoza, assistant secretary to "Countrywide Home Loans, Inc. doing business under the fictitious business name of America's Wholesale Lender".

BAC Home Loans Servicing, LP sent a notice of default dated January 12, 2011 to defendants Spero stating that they had defaulted on their mortgage loan and that the amount past due was \$29,918.25. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on December 29, 2011. In its complaint, plaintiff alleges in pertinent part, that defendants breached their obligations under the terms of the note and mortgage by failing to make the monthly payments commencing with the August 1, 2010 payment. Defendants interposed an answer with twenty nine affirmative defenses and one counterclaim. Plaintiff submitted a reply to defendants' counterclaim.

The Court's computerized records indicate that a foreclosure settlement conference was held on July 11, 2012. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendants Spero failed to comply with the terms of the loan agreement and mortgage, that their answer raised no issues of fact for trial and, that no valid affirmative defenses were raised by the defendants. In support of its motion, plaintiff submits among other things: the sworn affidavit of Jay Robert Karnes, assistant vice president of Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP (BANA); the affirmation of Mark Golab, Esq.; the affirmation of Peter Dinsmore, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, corrective assignment of mortgage; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; affidavits of service for the summons and complaint; an affidavit of service of the instant summary judgment motion upon the attorneys for defendants Spero; and a proposed order appointing a referee to compute. Defendants Spero cross-move seeking an order dismissing plaintiff's complaint or in the alternative, a denial of plaintiff's summary judgment application. Plaintiff in reply opposes defendants' cross-motion.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (see *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action "[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced" (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]).

Here, plaintiff has failed to establish, *prima facie*, that it had standing to commence this action. The evidence submitted by the plaintiff in support of its motion did not demonstrate that the note was physically delivered or assigned to it prior to the commencement of the action. The affidavit from BANA's assistant

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vice president, Jay Robert Karnes, did not provide any factual details of a physical delivery or assignment of the note and thus, failed to establish possession of the note prior to commencing this action (*HSBC Bank USA v Hernandez*, 92 AD3d 843; *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 934 NYS2d 182 [2d Dept 2011]). Conclusory boiler plate statements such as “[p]laintiff is the holder of the note” will not suffice when standing is raised as a defense (see *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2d Dept 2011]; *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]).

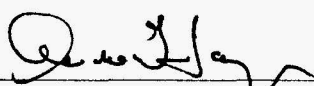
Furthermore, the submissions before the court do not establish through competent evidence the authority of Jay Robert Karnes, an assistant vice president to BANA, a non-party to this mortgage foreclosure action, to act on behalf of plaintiff Bank of New York in this matter (see *HSBC v Betts*, 67 AD3d 735, 888 NYS2d 203 [2d Dept 2009]). Similarly, the submissions fail to establish through competent evidence that BANA is the servicing agent for plaintiff Bank of New York. Moreover, the affidavit of Jay Robert Karnes erroneously states that he is “...authorized to sign this affidavit on behalf of **plaintiff, Bank of America, N.A...**” (emphasis added). Thus, plaintiff has also failed to present evidence sufficient to support the entry of an order for the relief requested.

Lastly, plaintiff’s application is procedurally defective for failure to comply with CPLR 3215 (g)(1) and CPLR 3215 (g)(3)(i) as same applies to those defaulting defendants who were served and have neither appeared nor answered.

Since defendants’ cross-motion (002) has successfully raised an issue of fact as to standing, plaintiff’s motion for summary judgment against defendants Spero, to strike their answer and for an order of reference is denied. Defendants’ cross-motion is granted solely to the extent provided for herein.

The foregoing constitutes the decision and order of the court.

Dated: 3. 31. 14


A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION